

# Multijurisdictional Privilege Issues in Internal Investigations

Evidence in Competition Law Proceedings  
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**Marc Hansen**  
**Latham & Watkins**  
**Brussels & London**

# Three privilege issues in cartel enforcement

- What are the current issues?
  - Waiver of privileged internal investigation records as a condition for leniency
  - “Whose” privilege in internal investigations
  - “Which” privilege applies to internal investigations
- Why does it matter?
  - Disincentives to compliance and self-investigation?
  - Disincentives to seeking immunity and leniency?
  - Disclosure requirements may determine leniency forum choice

# Waiver of LPP – Internal investigation records

- What cooperation is required from leniency applicant?
  - Providing evidence and facts; making available witnesses
  - Until recently, no jurisdiction required leniency applicant to turn over privileged records of internal investigation
- UK criminal enforcement procedure
  - Duty to disclose “unused material” to defendant that might assist its case or undermine the OFT’s case (*BA/Virgin; Condor Review*)
  - OFT seeks interview records from leniency applicant for transmission to defendant (“assisting case of the accused”; Sect. 3 CPIA 1996)
  - Is it “witness account material” or privileged
- Practice caused significant concern
  - Inconsistent with practice of other global authorities; So far UK is on its own
  - DOJ, EU, ACCC & Bureau against disclosure of internal investigation results
  - Incompatible with “corporate statement” based enforcement systems
  - Disincentive to cooperate: Waiver of privilege leads is complete (subject-matter waiver in US) and evidence discoverable in US class actions

# Solution to UK waiver requirement?

- Considerable debate over the past three years
  - In international cases, there is friction with other authorities
  - Waiver risk operates as disincentive to cooperating with OFT
  - Two consultations to seek solutions
- What solutions?
  - Problem arose out of two party case; “he said, she said” and credibility
  - Solutions should be proportionate to real issues
  - What has been proposed?
    - Waiver when case is before court or pre-charge investigative state (waiver)
    - Disclosure of unused material to Independent Counsel (waiver in US law)
    - Limited waiver (but subject matter waiver under US LPP doctrine)
    - Very limited investigation by applicant (is that practical w. EU and DOJ?)
    - Applicant proffers on “no exculpatory evidence” in their possession
    - Obtaining court order (in camera review and protective orders; *Permian* on voluntary waiver)

# “Whose” privilege in internal investigations

- Internal investigations in competition case:
  - A company seeking to determine competition law violation through interviews with employees
  - Who is the client and what privilege applies?
- US practice – *Upjohn* warning
  - Bias in favor of corporation’s privilege; broad interpretation of the client to include the employees
- UK situation
  - Owen J in *R v. George* (citing *Three Rivers* No. 5) – narrow definition of the client (excludes the employees)
  - Fall back on litigation privilege? But is it adversarial at that stage? (*Tesco*)

# “Which” privilege in internal investigations

- Privilege means different things to different people
- US : Attorney-Client v. Attorney Work Product Privilege
  - Attorney-client privilege is an absolute privilege unless waived
    - Elements include advice sought and given; in confidence
  - Work product doctrine in anticipation of litigation
    - Judged on balance of interests when asserted
    - No other source for information without undue hardship
  - Waivers re some communications, waives all (subject matter)
- UK : Legal advice privilege v. litigation privilege
  - Legal advice privilege can be narrow (*Three Rivers*)
  - Litigation privilege only where adversarial (*Tesco*)
- Australia: Litigation privilege may kick in late
  - Litigation “contemplated” just before court proceeding (*ACCC v Prysmian*)
- Compare AM&S: “earlier written communications” (recital 23)

# What is the net outcome?

- **Legal privilege should be treated with care**
  - Break it and it cannot be put back together
- **Leniency relies predictable cost/benefit analyses and perceptions as to how procedures operate**
  - Upset the perception, and incentives to cooperate may dry up
- **Corporate internal investigations are the motor of any corporate leniency policy**
  - Facilitate them; There are other ways to protect the rights of defence – such as exhaustive investigations by enforcers

## Further information on this:

- [Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications](#)  
(Vancouver DOJ/ABA/IBA, Jan 2012; OECD 11th Global Forum on Competition, Feb 2012)
  - <http://www.lw.com/presentations/challenges-to-international-cartel-enforcement>
- [Procedural and Substantive Conflicts in Multi-Jurisdictional Cartel Investigations](#)
  - <http://www.lw.com/presentations/multi-jurisdictional-cartel-investigations>
- [Latham & Watkins Response to the OFT's Supplementary Consultation on Applications for Leniency and No-action in Cartel Cases](#)
  - <http://www.lw.com/thoughtLeadership/applications-leniency-no-action-cartel-cases>

- **Marc Hansen**  
**LATHAM & WATKINS LLP**  
Boulevard du Regent 43-44  
1000 Brussels  
Tel: +32 2 788 6000  
Dir: +32 2 788 6301  
Cell Phone: +44 7876 506 990  
Email: [marc.hansen@lw.com](mailto:marc.hansen@lw.com)

**LATHAM & WATKINS**  
99 Bishopsgate  
London EC2M 3XF  
Tel: +44 20 7710 1000  
Dir: +44 20 7710 1094